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90-1457

Supreme Court, U.S.
FILED
MAR 13 1991
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

MARCIA J. LITTLES, M.D.,

PETITIONER,

VS.

AREA HEALTH DEVELOPMENT BD., MOSTELLAR MEDICAL CENTER, JAMES A. HOLLAND, AND TYLER W. PEEK,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RONNIE L. WILLIAMS
ATTORNEY FOR PETITIONER
814 ST. FRANCIS STREET
MOBILE, ALABAMA 36602
(205) 432-6985

QUESTION PRESENTED

I

Whether a Federal District Court's finding of fact in favor of a defendant in a Title VII case are clearly erroneous as a matter of law, when the defendant's trial testimony upon which the findings are based contradict business records prepared and maintained by the successful defendant.

PARTIES IN THE COURT BELOW

All parties in this matter are set forth in the caption of this case.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

MARCIA J. LITTLES, M.D.,

Petitioner,

VS.

AREA HEALTH DEVELOPMENT BD., MOSTELLAR MEDICAL CENTER, JAMES A. HOLLAND, AND TYLER W. PEEK,

Respondents.

==========

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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The Petitioner, Marcia J. Littles, M.D., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of

Appeals for the Eleventh Circuit entered in this proceeding on November 2, 1990, affirming the judgment of the United States District Court for the Southern District of Alabama. The opinions of the Federal District Court and the Court of Appeals are set out in Appendix A through B respectively, **infra**.

JURISDICTION

The Judgment of the Court of Appeals affirming the District Court's Judgment was entered on November 2, 1990. APP. 1a. The Court of Appeals entered an Order denying a timely Petition for Rehearing on December 13, 1990. APP. 1b. The jurisdiction of this Court is found in 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

This case involves Title VII of the Civil Rights Act of 1964, as codified at 42 U.S.C. Sections 2000e-2(a)(1) and 3(a). Section 2000e-2(a)(1) provides:

It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; and Section 2000e-3(a) provides:

(2) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in

an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

Proceedings Below

The petitioner, Marcia J. Littles, M.D., brought this action on June 2, 1988, in the United States District Court for the Southern District of Alabama, against her former employer, Area Health Development Board, Mostellar Medical Center, its Board Chairman, Tyler W. Peek, and its Executive Director, James A. Holland, alleging that her rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e et seq., and 42 U.S.C. Sections 1981 and 1983, had been violated as a result of the respondents failing to promote her to a medical

director vacancy because of her sex, and a retaliaton discharge for the filing of an EEOC Complaint regarding the non-promotion.

The case was tried by the court without a jury from October 16 to October 17, 1989. At the conclusion of the trial the court ordered each party to submit proposed findings of fact and conclusions of law, and following which, on January 8, 1990, the district court rendered a Judgment for the respondents and against the petitioner, dismissing her claim and denying her any relief. App. 1c- 2c. The court also issued on January 8, 1990, its Findings of Fact and Conclusions of Law. App. 1d - 20d.

Petitioner appealed the dismissal to the United States Court of Appeals for the

Eleventh Circuit, alleging that the Findings of Fact upon which the district court's Judgment is based are clearly erroneous within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure. The court of appeals affirmed the district court's Judgment in an unpublished Opinion. App. 1a.

A timely petition for rehearing was denied by the court of appeals on December 13, 1990. App. 1b.

Statement of Facts

Petitioner is a black female physician licensed to practice as an internist in the State of Alabama. (R2-11-14).

Petitioner's medical education was partially funded by a scholarship from the

National Health Service Corps, and to fulfill her scholarship service obligation upon completion of medical school, she accepted a "private practice assignment" with respondent Medical Center in July of 1988, in Bayou LaBatre, Alabama. (R2-15-16).

The respondent Mostellar Medical Center is a medical treatment facility that receives approximately sixty percent (60%) of its funding from federal sources, and is governed by respondent Area Health Development Board, Inc. (R2-18).

Respondent James A. Holland is the Executive Director for the Mostellar Medical Center, and respondent Tyler W. Peek serves as the Board Chairman of the respondent Area Health Development Board. (R2-416).

Respondent Holland is not a physician, but as Executive Director he is responsible for the day to day operation of the respondent Medical Center. The respondents employ a number of health care practitioner (doctors, nurses, etc.) and one of the physicians serve as medical director, and is responsible for the supervision of the medical staff.

In that a substantial portion of respondent's funding comes from the U.S. Public Health Service, the respondent is required to meet certain minimum operating standards and procedures set forth by the Bureau of Health Care Delivery and Assistance of the Public Health Service.

The Public Health Services has several program "indicators" that it utilizes as funding criteria, and it

expects all clinics to be in compliance with the program indicators by the end of their second full year of operation. (R2-419).

The standard for daily on-site patient encounters per staff physician is a minimum of eighteen (18) at "established" clinics. (R2-68).

Clinics operational for less than two years, and newly established service components of existing clinics are not expected to achieve all program indicators, and are only expected to achieve two-thirds of the standards in the area of on-site daily patient encounters. (R2-68 & 69).

Petitioner entered into an employment contract with the respondents whereby, effective July 18, 1986, she would

practice her medical specialty of internal medicine at the respondents' newly opened satellite clinic in Grand Bay, Alabama. (R2-15 & 16). In operating the newly established Grand Bay Clinic, petitioner was solely responsible for generating a patient clientele. (R2-21 & 22).

In the spring of 1987, the present medical director of the respondent clinic gave notice of his resignation effective July 1, 1987, thereby creating a vacancy for the medical directorship of the respondent medical center.

Petitioner submitted a letter of interest regarding the medical director vacancy, requesting information regarding the position. (R2-47).

During this same time period, the respondents were interviewing applicants

for "staff physician" positions to be filled in July of 1987. One of the physicians interviewed for a staff physician position was Dr. Raymond Broughton who was expected to complete his residency in internal medicine in July of 1987. Dr. Broughton, like the petitioner, was seeking a "private practice assignment" to complete his National Health Scholarship service obligation. (R2-217).

Dr. Broughton was not interviewed for the medical director vacancy, and was not contacted regarding that position until after he had returned home following his interview for a staff physician position with the respondents.

According to the Minutes of respondents' May, 1987 Board Meeting, respondent Holland advised the Board that he and his assistant had reviewed all of the staff physicians in the organization, and he had decided that the incoming physician, Dr. Broughton, would be the recommended physician to fill the medical directorship.

At this same Board Meeting, respondent Holland advised the Board that petitioner had submitted a letter of application for the position, but that she would not be a good choice since she is located in a satellite clinic as opposed to the main medical center, where the present medical director is based.

At its meeting in June of 1987, the respondent Board approved the selection of

Dr. Broughton as the new medical director, and rejected petitioner for the reason stated by respondent Holland during the May Board Meeting.

Several months prior to the June, 1987 decision to hire Dr. Broughton as medical director, respondents had actively sought the approval of the Public Health Service for the recruitment of a family practitioner for the Grand Bay Clinic so as to transfer petitioner to another location, and alleviate the need to base two doctors at Grand Bay, an internist for adult patients, and a pediatrician for children.

This plan was not carried out solely because the board could not obtain the Public Health Service's approval for a family practitioner's position in Grand Bay.

When petitioner received no response to her April 1987 letter of application, she sent a second letter to respondent Holland dated June 3, 1987, again requesting information regarding the official advertisement for the job, effective date of the position, salary and other essential information.

Petitioner received no reply from the respondents regarding either of her letters of interest, and she was never interviewed for the medical directorship vacancy.

On July 15, 1987, petitioner submitted a Charge of Discrimination to the EEOC's Regional Office in Birmingham, Alabama, alleging sexual discrimination in the denial of the requested promotion. At the time petitioner's Charge of

When petitioner received no response to her April 1987 letter of application, she sent a second letter to respondent Holland dated June 3, 1987, again requesting information regarding the official advertisement for the job, effective date of the position, salary and other essential information.

Petitioner received no reply from the respondents regarding either of her letters of interest, and she was never interviewed for the medical directorship vacancy.

On July 15, 1987, petitioner submitted a Charge of Discrimination to the EEOC's Regional Office in Birmingham, Alabama, alleging sexual discrimination in the denial of the requested promotion. At

the time petitioner's Charge of Discrimination was submitted to EEOC, a courtesy copy was sent to the respondent Board Chairman, who read the letter and the Charge of Discrimination to the Board at its July 20, 1987 meeting. During this July meeting, the Board also discussed the fact that petitioner's employment contract contained a provision permitting the at-will termination of her employment.

In March of 1988, petitioner received a notice indicating that she was being terminated by the respondent Board for "low productivity."

During petitioner's tenure with the respondent medical center, the Grand Bay Satellite was never cited by the Atlanta Regional Office as being "out of compliance" in any respect. In fact, the regional office has never registered any

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complaints, or concerns regarding the number of daily patient encounters petitioner experienced at the Grand Bay site.

Prior to petitioner's employment with the respondents, the Mostellar Medical Center had been "cited" by Atlanta for being out of compliance in the number of daily patient encounters, and even though the medical center had actually reached the point of being cited, no physician at the Mostellar Clinic was terminated, suspended, warned, or even disciplined in any manner as a result of the infraction.

The Mostellar Medical Center is larger than the Grand Bay Satellite, and is considered to be an "established" clinic, one that is expected to meet the eighteen (18) per day minimum on-site encounter rate.

REASON FOR GRANTING THE WRIT

IN LITIGATION INVOLVING PUBLIC AGENCIES, BOARDS, AND COMMISSIONS, A FEDERAL DISTRICT COURT'S FINDINGS OF FACT SHOULD NOT BE CONTRARY TO FACTS CONTAINED IN LAWFUL MINUTES OF SUCH PUBLIC BODIES WITHOUT A SHOWING THAT THE MINUTES ARE IN ERROR.

In view of Rule 52(a)'s treatment of findings of fact based on documentary evidence, as reflected in its 1985 amendment, certain documents such as board minutes, that are required by law to be maintained by public boards and commissions, and accuracy attested to by board member approval, should be received by a district court as proven facts in a non-jury trial.

The district court made a finding of fact that:

"Plaintiff's low productivity concerning the number of patient encounters that she had per day is in itself a legitimate non-discriminatory reason for plaintiff's termination and non-promotion. This low productivity not only justified the challenged employment decisions but actually placed defendants in jeopardy of loosing federal funding necessary to maintain the clinic."

Appendix D Page 7d.

The district court made a further finding that:

"Dr. Littles continuously turned patients away who were seeking medical treatment... no other physician with the exception of Dr. Littles employed by the Mostellar Medical Clinic have ever refused to see a patient or turned a patient away."

Appendix D Page 7d-8d.

These two very important findings by the district court were contradicted by the Minutes of the respondent Board and

trial exhibits prepared by the "respondents."

The respondents' Trial Exhibit No. 5, was a graph showing the number of monthly patient encounters for each physician employed from August, 1986 through December, 1988. The graph indicated that of the eight (8) physicians employed during the stated period of time, only two equaled or exceeded the expected daily patient encounter rate of eighteen (18), and only one (1) of those two was based at the main established clinic.

Respondents' Exhibit 5 clearly and unequivocally showed that petitioner was not the only physician that did not see at least eighteen (18) patients per day, and further, at least three (3) of the other physicians were based at the "established"

medical center, where the eighteen (18) per day encounter rate is their expected standard goal. Petitioner's standard goal in the newly opened satellite clinic was only twelve (12) encounters per day.

Respondents' Exhibit 5 also clearly indicated that the pediatrician that was later assigned to the satellite clinic in Grand Bay with petitioner, was not meeting the required daily patient encounter rate for a satellite clinic. But yet, no disciplinary action of any sort was instituted against her. She was averaging one encounter per day more than petitioner.

The district court's findings did not specifically deal with petitioner's claim of sexual discrimination in her non-selection for the medical director vacancy. Aside from a passing statement

that petitioner was considered for the position along with others, and that she was found unacceptable because she was not practicing at the Mostellar Medical Center location, there was no further comment on this issue.

The district court made no findings regarding the relative qualifications for the medical director vacancy of petitioner versus Dr. Broughton, the male who was selected.

Petitioner had been a practicing pharmacist for approximately ten (10) years prior to entering medical school. She was board certified in internal medicine in 1985, and had served as an associate instructor at a medical school in the State of Virginia prior to accepting her public health assignment with the respondents. Petitioner was an

officer in the National Health Service Corps for approximately five (5) years prior to entering medical school as well.

On the other hand, Dr. Broughton had not completed his residency program for internal medicine at the time of his selection as the medical director, he had never supervised anyone other than interns and medical students during the normal course of his residency training, he had never engaged in the practice of medicine outside of an educational setting, and he testified at trial that, other than his selection by the respondents, he was not aware of any physician obtaining a medical directorship with any type of health clinic or hospital, immediately out of a residency program.

There was absolutely no testimony that petitioner's alleged low patient encounter rate had any effect on her non-selection for the medical directorship. The only reason put forth by the respondents at the time of her non-selection, and at trial, was that petitioner was located in the satellite clinic, and the medical director position is located at the main medical center. Further, any comments attributed to Dr. Broughton by the district court's Findings of Fact could not possibly have any application to plaintiff's non-selection as medical director, because until he was selected as medical director, Dr. Broughton was not an employee of the respondents.

As to petitioner's claim of a retaliatory discharge, the district court made a finding of fact that:

> "Plaintiff filed the EEOC Charge on July 27, 1987, yet defendants did not decide to terminate her position until March of 1988, and she was not formerly terminated until May of 1988. Eight months elapsed between the time she filed her EEOC Charge and the time defendants decided to discharge her. This long period of time rebuts any inference of retaliatory discharge."

This finding by the district court, ignores the minutes of the respondents following the July, 1987 board meeting during which petitioner's charge of discrimination was read.

Subsequent to the July, 1987 meeting, respondents sent to the Atlanta Regional Office of the Public Health Service, a letter seeking support for the termination

of petitioner. The letter stated in pertinent part:

> "The attorneys we employ are aware of the eighteen patient encounter standard per day and they feel it is vital to our case that we provide them something in writing that binds the physicians employed to the eighteen encounter per day standard."

The letter went on to state that if Regional Office could provide respondents with some "written guideance" that would indicate that physicians are required to see a minimum of eighteen patients per day "it would be greatly appreciated and certainly provide invaluable support for our case."

Prior to petitioner's termination, there was no "case" exccept for her pending EEOC Charge of Discrimination.

The respondents' letter was seeking

support for petitioner's termination based on the daily patient encounter rate for an established clinic, when the respondents knew that, not only was petitioner not required to have eighteen (18) encounters per day, but also, only one physician at the established clinic was seeing the required number per day. The respondents were asking for written support to take adverse action against the petitioner, when at the same time, the "written guidance" sought could have, and should have been applied to other physicians, particularly those working in the established clinic.

At the Board's December 10, 1987 meeting, the Minutes reflect that respondent Holland was going to "explain to the Board that the purpose of the meeting was to make a decision on Dr.

Littles, but because a response has not been received from the Regional Office, the request and decision on Dr. Littles will be postponed. The Regional Office does not want to commit themselves to the fact that a physician should see forty-two hundred (4,200) encounters per year." (Which works out to eighteen encounters per day).

A quick review of the various physicians employed by the respondents during petitioner's tenure there reveals the following:

(1) Dr. Broughton averaged only fourteen patient encounters per day.

(2) Dr. Altman, the pediatrician in the Grand Bay Satellite with petitioner saw only nine patients per day on average.

(3) Dr. Vanderwood, a family practitioner serving in the established

Mostellar Medical Center averaged less patient encounters per day than the required eighteen.

(4) Dr. Ashbee, a pediatrician in the established Mostellar Clinic where eighteen is the expected standard, averaged only 15.4 patient encounters per day.

(5) Dr. Benjamin, another family practitioner serving in the Mostellar Clinic, saw only twelve patients on average.

Aside from petitioner, no physician was terminated or disciplined in any fashion because of a failure to meet the expected patient encounter rate.

The district also made a finding of fact that petitioner's low patient encounter rate "actually placed defendants in jeopardy of loosing federal funding

necessary to maintain the clinic." (App. D at 7d).

There was absolutely no evidence at all suggesting that the Grand Bay Satellite Clinic was in jeopardy of loosing its funding. In fact the evidence was clear that Atlanta never complained about Grand Bay. It was the respondents who continued to solicit and plead with Atlanta to assist in the termination of petitioner following the filing of her Charge of Discrimination with EEOC.

Many, if not all, of the critical facts of this case are contained in the minutes of the respondent Board that are required by law to be maintained and open for public inspection.

These Board minutes and official correspondence between the respondent agency and other governmental agencies

having supervisory authority over it, certainly contain the best evidence of actions taken by the respondents relating to the termination.

As set out above, on several essential factual determinations, the district court ignored the documentary record before it, and accepted the facts as related by the respondents.

Records that are required by law to be prepared and maintained by an agency, and which are also approved by the members of the governing body of the agency should certainly be accepted as "factually correct" as to what transpired during a particular meeting.

A distinction can be made between that type of documentary evidence that includes depositions, affidavits and stipulations of fact, which may be

prepared with litigation in mind, and documentary evidence of a sort that is maintained in the regular course of an agency's function, and are approved by the members of the governing body, and are opened to public inspection at any point and on any occasion, including litigation.

There is substantially more confidence in relying upon minutes duly taken, reviewed and approved as opposed to an affidavit of an individual expressing a particular view on a topic without any checks and balances.

There is a general rule in the State of Alabama that city boards, commissions and other public agencies that are required by law to maintain minutes of their meetings, "speak through their minutes." Kimbrell v. City of Bessemer, 380 So.2d 838, 839 (Ala. 1980). The

Alabama Supreme Court in Kimbrell held that minutes of such boards are the best evidence of official action taken by the board. Id. at 839.

For a district court to dismiss or ignore official documents of a public body, there must be a showing that the documents are flawed in some manner. Otherwise, public confidence in minutes of public board meetings would be severly shaken, and without such a rule laws requiring minutes and the maintenance of other official documents by public agencies will be meaningless. This conveys the notion that the documents themselves cannot be relied upon at face value.

CONCLUSION

Considering the foregoing, petitioner respectfully requests that a Writ of

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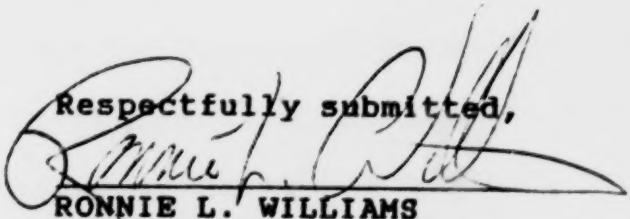
Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,



RONNIE L. WILLIAMS
Attorney for Petitioner
814 St. Francis Street
Mobile, AL 36602
(205) 432-6985

March 13, 1991

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 90-7099

MARCIA J. LITTLES, M.D.,

Plaintiff-Appellant,

versus

AREA HEALTH DEVELOPMENT BD.,
MOSTELLAR MEDICAL CENTER,
JAMES A. HOLLAND,
TYLER W. PEEK,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Alabama

---

ON PETITION(S) FOR REHEARING
(DECEMBER 13, 1990)

BEFORE: TJOFLAT, Chief Judge,

FAY and ANDERSON, Circuit Judges

PER CURIAM:

The petition(s) for rehearing filed by appellant Marcia J. Littles, M.D., is denied.

ENTERED FOR THE COURT:

PETER T. FAY /S/
United States Circuit Judge

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 90-7099
Non-Argument Calendar

D.C. Docket No. 88-0478-T

MARCIA J. LITTLES, M.D.,

Plaintiff-Appellant.,

versus

AREA HEALTH DEVELOPMENT BD.,
MOSTELLAR MEDICAL CENTER,
JAMES A. HOLLAND,
TYLER W. PEEK,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Alabama

---

(November 2, 1990)

Before TJOFLAT, Chief Judge,

FAY and ANDERSON, Circuit Judges.

PER CURIAM:

The record in this matter fully supports the ruling of the district court. Credibility questions are peculiarly within the province of the fact finder.

The judgement is affirmed.

APPENDIX "C"

THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

MARCIA J. LITTLES, M.D.	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 88-0478-T
AREA HEALTH DEVELOPMENT BOARD, INC., ET AL.,	)	
Defendants.	)	

JUDGMENT

Pursuant to the Findings of Fact and Conclusions of Law filed this date, it is ORDERED, ADJUDGED and DECREED, that plaintiff Marcia J. Littles shall have and recover NOTHING from defendants Area Health Development Board et al., on all claims arising out of this litigation. This claim is dismissed. Costs taxed against the plaintiff.

DONE THIS 8th day of January, 1990.

DANIEL H. THOMAS /S/
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX "D"

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

MARCIA J. LITTLES, M.D.,	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 88-0478-T
AREA HEALTH DEVELOPMENT BOARD, INC., ET AL.,	)	
Defendants.	)	

The above styled action was heard before this Court on October 16th, 1989. This Court has fully considered all pertinent materials in the file and hereby makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiff, Marcia J. Littles, a black female, is a physician licensed to practice medicine in the state of Alabama.

2. Plaintiff is a National Health Service Corps Scholarship recipient. Plaintiff entered into an employment contract with the Mostellar Medical Clinic in order to fulfill her scholarship service obligation. Plaintiff was employed effective July 18, 1986, at the Grand Bay satellite clinic.

3. The Mostellar Medical Center, is a medical treatment facility organized and operated under the laws of the state of Alabama, and is governed by the Area Health Development Board, Inc.

4. Defendant, James A. Holland, a white male, serves as the Executive Director of the Mostellar Medical Center and is charged with the overall operation and supervision of the Mostellar Center and its satellite clinic in Grand Bay and McIntosh, Alabama. Defendant Holland is responsible for the day to day operation of the Mostellar Center. He is not a physician.

5. Defendant, Tyler Peek was Chairman of the Board of the Area Health Development Board when Dr. Littles was hired and terminated. Mr. Tyler testified that the Chairman position was a non-paying position and that the Area Health Development Board was a non-profit corporation.

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6. The Mostellar Medical Center, through the Area Health Development Board, Inc., is funded in substantial part by the Bureau of Health Care Delivery and Assistance of the U.S. Public Health Services Branch of the Department of Health and Human Services. In that a substantial portion of the funding comes from the U.S. Public Health Service, the Area Health Development Board is required to meet certain minimum operating standards and procedures set forth by the Bureau of Health Care Delivery and Assistance of the U.S. Public Health Service.

7. In March of 1987, Mr. Holland interviewed Dr. Raymond Broughton for a staff physician position at the Mostellar

clinic. Dr. Broughton was expected to complete his residencey in July of 1987, and he was interviewing for the purpose of securing a private practice assignment to complete his National Health Scholarship service organization.

8. In March of 1987, Dr. Allen Shain, medical director, gave notice to Mr. Holland of his resignation effective July 1, 1987, thereby creating a vacancy for the medical directorship of the Mostellar Medical Center.

9. Plaintiff submitted a letter of interest to Mr. Holland in April of 1987, regarding the medical director vacancy, requesting information relative to the requirements for the position.

10. At its meeting of May 18, 1987, the Area Health Development Board was advised by Mr. Holland that Dr. Shain, the present medical director, would be leaving the Mostellar Center in July, and that a new medical director would have to be selected.

11. At the May 1987 Board meeting, Mr. Holland advised the Board that he and his assistant had reviewed all of the staff physicians in the organization and that it had been decided that Dr. Broughton would be the physician recommended to fill the medical directorship. Mr. Holland advised the Board members that plaintiff had submitted a letter of application for the position, but that she would not be a good choice as

she was located at Grand Bay as opposed to Mostellar, where the present director is based.

12. At its meeting in June of 1987, the Area Health Development Board approved the selection of Dr. Broughton as the new medical director.

13. Plaintiff sent a second letter to Mr. Holland dated June 3, 1987, requesting information concerning the official advertisement for the job, effective date of the position, salary, and other essential job information. Plaintiff received no reply to the second letter. Plaintiff became aware that the medical director position had been filled when she received a memo advising all staff members that Dr. Broughton had been selected.

14. Plaintiff submitted a Charge of Discrimination to the EEOC's Regional Office in Birmingham, Alabama, on July 15, 1987, alleging discrimination in the denial of the requested promotion. Plaintiff's attorney sent a copy of the charge of discrimination to Mr. Peek along with a cover letter explaining that defendants were being charged with discrimination.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. Section 1331, 28 U.S.C. Section 1343(3) and 42 U.S.C. Section 2000.

2. Plaintiff's claim is based upon her alleged termination on the basis of sex and race and upon her non-promotion on

the basis of her sex. Plaintiff also asserts a "retaliatory" discharge claim under Title VII. For the reasons outlined below this Court concludes that plaintiff Marcia J. Littles is not entitled to relief under any of her legal theories.

3. This Court must first consider whether Dr. Littles has established a preponderance of the evidence, a prima facie case of sex discrimination. If the Court determines that plaintiff has established a prima facie case, then the burden of proof shifts to defendants to articulate legitimate, non-discriminatory reasons for their actions. (Defendant does not bear the burden of persuading the court that it was actually motivated by the proffered reasons, it is sufficient if defendant's evidence raised genuine issues

of fact as to whether it discriminated against plaintiff). Upon such a showing, the burden shifts back to plaintiff to show that the articulated reasons were a pretext for discrimination and that the true motives were unlawful. The Supreme Court has stated that in employment discrimination suits the ultimate burden of persuading the trier of fact that defendants intentionally discriminated against plaintiff, remains at all times with plaintiff. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed. 2d 207 (1981).

DENIAL OF PROMOTION AND TERMINATION

4. Assuming arguendo that plaintiff established a prima facie case, it is

without question that defendants in this action have met their burden of producing evidence that legitimate, non-discriminatory reasons existed for plaintiff's non-promotion and termination.

5. Dr. Littles testified that she was not considered for the position of medical director in July of 1987, which was later assigned to Dr. Broughton, a black male physician. The evidence clearly indicates that all physicians were considered for the position of medical director prior to Dr. Broughton accepting the position. The minutes of the meeting as shows in defendants exhibit 15 clearly show that all physicians including Dr. Littles were considered for the position of medical director and that both Dr. Bowman of the McIntosh Satellite Clinic

and Dr. Littles of the Grand Bay expansion site were considered but found to be unacceptable because neither doctor would be practicing medicine at the Mostellar Medical Center site where the medical director position was available. In addition Dr. Susan Ashbee, a white female physician, employed and working at the Mostellar Medical Center since 1981, was offered the position of medical director during the selection process but declined to accept the position.

6. Plaintiff's low productivity concerning the number of patient encounters that she had per day is in itself a legitimate non-discriminatory reason for plaintiff's termination and non-promotion. This low productivity now only justified the challenged employment decisions but actually placed defendants

in jeopardy of losing federal fundings necessary to maintain the clinic.

7. The evidence disclosed that Dr. Littles continuously turned patients away who were seeking medical treatment and that these concerns were brought to the attention of Dr. Broughton and Mr. James Holland. Dr. Broughton testified that patients were turned away, appointments were cancelled, patients were asked to leave who were waiting in the office to receive treatment, and that none of the co-employees or the support help desired to work with Dr. Littles. No other physicians with the exception of Dr. Littles employed by the Mostellar Medical Clinic have ever refused to see a patient or turned a patient away. Dr. Broughton testified that he told Dr. Littles if she didn't improve her low patient encounters

that the result could be either the closing of the clinic for lack of funding or her possible termination. He stated that she responded to his concerns by saying, "that's life in the big city." Dr. Broughton testified that after sharing his concerns with Dr. Littles regarding her refusal to see patients, she remained blank and non-responsive. Dr. Broughton said that Dr. Littles was robotic in nature and could not accept criticism of any kind.

8. Dr. Broughton outlined his principal duties and responsibilities and identified defendants exhibit 2 as the job description for the medical directorship. Exhibit 2 clearly shows that one of the qualifications for the medical directorship is that the medical director should be sensitive to the needs of people

from widely diverse cultural backgrounds and must exemplify leadership potentials in the development of a team approach toward establishing a comprehensive health service delivery system.

9. The Court finds that Dr. Littles was definitely not a team player and did not exhibit a team approach toward anything. Dr. Broughton testified that he did not visit the Grand Bay site because of the anger displayed by Dr. Littles when she was being supervised or corrected by her superiors. Dr. Broughton testified that Dr. Littles had a problem everyday; that she was a problem maker and not a problem solver. Dr. Broughton testified that Dr. Littles had low patient encounters and he had warned her on numerous occasions that low patient encounters and/or low productivity at the

Grand Bay site could result in either the clinic being closed or her being terminated. Dr. Broughton concurred with Mr. Holland's recommendation and the Board's decision to terminate Dr. Littles.

10. Plaintiff has not met her burden of showing that the proffered reasons for her termination and non-promotion were a pretext for discrimination and that the true motives were unlawful.

RETALIATORY DISCHARGE

11. Plaintiff also brings a retaliatory discharge claim alleging that she was discharged by defendants solely because she filed a claim with the Equal Opportunity Commission on July 27, 1987. Plaintiff filed the EEOC charge on July 27, 1987, yet defendants did not decide to terminate her position until March of

1988, and she was not formally terminated until May of 1988. Eight months elapsed between the time she filed her EEOC charge and the time defendants decided to discharge her. This long period of time rebuts any inference of retaliatory discharge. Moreover, plaintiff received two significant pay raises between the time she filed her EEOC charge and the time that she was terminated. These pay raises negate any inference that plaintiff was retaliated against for filing the EEOC charge.

12. Filing a complaint with the EEOC does not give an employee the right to fail to perform assigned work nor does it preclude an employer from discharging an employee who fails to do assigned work.

13. Plaintiff has not met her burden of showing that there was a casual

connection between the filing of her EEOC charge and the adverse employment decision against her. Plaintiff will prevail, "... only by proving that but for the protected activity she would not have been subjected to the action of which she claims. If the employee does not bear that burden of persuasion, she may not prevail." Jack v. Texaco Research Center, 743 F.2d 1129, 1131 (5th Cir, 1984).

42 U.S.C. Section 1981

14. Plaintiff also alleges a violation of 42 U.S.C. Section 1981. The United States Supreme Court recently held that 42 U.S.C. Section 1981 only applies to claims involving the making and enforcing of contracts and does not apply to "post formation" conduct. Patterson v.

(1989). In this action the making and enforcing of a contract is not in issue and all issues deal with post employment conduct. Furthermore, Title VII provides the exclusive remedy in discharge claims. Lytle v. Household Manufacturing, 831 F.2d 1057 (4th Cir. 1987). Also section 1981 claims apply only to race discrimination and not to sex discrimination. Runyon v. McCrary, 427 U.S. 160, 167 (1976). Finally, plaintiff must prove intentional discrimination to recover under Section 1981. St. Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987). Plaintiff has not proved intentional race discrimination and as such her claim under 42 U.S.C. 1981 is denied.

42 U.S.C. SECTION 1983

15. Plaintiff also claims relief

under 42 U.S.C. Section 1983. However, plaintiff has failed to prove a vital element of such a claim, i.e. "state action" or proof that defendants acted under "color of state law." In Mendez v. Belton, 739 F.2d 15 (1st Cir. 1984), the Court held that the action of a highly regulated, private, non-profit entity, was not under "color of state law." The clinic in this action is a highly regulated, private, non-profit entity, and its actions are not under "color of state law."

CONCLUSION

16. Defendants have articulated legitimate non-discriminatory reasons for not promoting plaintiff and for her termination. Plaintiff has not proved discriminatory motive against defendants.

Accordingly, plaintiff's claims for relief are DENIED. In accordance with the above Findings of Fact and Conclusions of Law, a Judgment will be entered forthwith.

DONE this 8th day of January, 1990.

DANIEL H. THOMAS /S/
SENIOR UNITED STATES DISTRICT JUDGE

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